IN THE

Supreme Court of the United States

JANUARY 1943 TERM

No.....

THOMAS C. WILCOX, EDDIE WAY, BEN LANDSBERG, LOUIS ELLIOTT and CLYDE STAMBAUGH,
Petitioners,
vs.
THE PEOPLE OF THE STATE OF MICHIGAN,
Respondent

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I.

STATEMENT OF JURISDICTION

Petitioners, herein, pray this Court for a Writ of Certiorari to the Supreme Court of the State of Michigan to review the affirmance by that Court of which it denied a rehearing of petitioner's conviction of a felony commonly known as accepting bribe by a public officer, in the Circuit Court for the County of Wayne, and the said

Supreme Court of the State of Michigan being the highest court of said state, and it having by its final judgment deprived petitioners of certain titles, rights, privileges, and immunities, guaranteed by Section 1 of the Fourteenth Amendment, and Amendment Six of the Constitution of the United States of America, as aforesaid, it is claimed that this Court has jurisdiction of the subject matter herein involved under Section 237 (b) of the Act of Congress of February 13, 1925, Chapter 229, 43 Sta. 936. This has already been discussed under the Summary of Claims for Writ in the Petition.

II.

STATEMENT OF FACTS

This brief is filed in support of a petition for a writ of certiorari to the Supreme Court of the State of Michigan to review that Court's affirmance of Petitioners' conviction on the charge of conspiracy to permit gambling and the operation of houses of ill-fame, (Count 2, R. 34-43) in the Circuit Court for the County of Wayne.

Petitioners were convicted before the Hon. Earl C. Pugsley, one of Michigan's Circuit Judges sitting in the Wayne Circuit by a jury, of the crime commonly known as common-law conspiracy, and sentences were imposed on May 14, 1941, as follows:

Defendant and Appellant, Thomas C. Wilcox, was thereafter on the 14th day of May, 1941, sentenced to confinement in the Michigan State Prison at hard labor for a period of not less than four and one-half (4½) years nor more than five (5) years without recommendation, and fined in the sum of $2,000.00.

Defendant and petitioner, Eddie Way, was likewise on the 14th day of May, 1941, sentenced to be confined to the

Michigan State Prison at hard labor for a period of not less than two (2) years nor more than five (5) years; without recommendation and fined in the sum of $1,000.00. Defendants and appellants, Ben Landsberg, Louis Elliott and Clyde Stambaugh, were on May 14, 1941, each sentenced to be confined in the Michigan State Prison at hard labor for a period of not less than one (1) year, nor more than five (5) years, without recommendation and fined in the sum of $1,000.00 each.

Thereafter, your Petitioner, appealed to the Michigan Supreme Court, which affirmed the conviction. A petition for a rehearing was denied.

Petitioner, Thomas C. Wilcox, at the time this matter arose, was the duly elected and qualified Sheriff of Wayne County, Michigan. Your other petitioners are citizens of the State of Michigan.

Petitioners herein ask for a writ of certiorari to review the actions of the Supreme Court of Michigan.

III.

SUMMARY OF ARGUMENT

Petitioners were denied rights and immunities guaranteed by the due process clause of the Fourteenth Amendment and the Fifth and Sixth Amendments to the Constitution of the United States for the following reasons:

That your Petitioners were denied their rights to a fair and impartial trial as guaranteed by the Constitution of the United States (Amendments Fourteen, Five and Six) as follows:

1. That the jury which decided their case was illegally drawn and was empanelled in violation of the laws of the State of Michigan.

2. That the jury while deliberating was interfered with by a deputy sheriff attached to the Prosecution and given particular testimony, etc., without the knowledge or consent of the trial judge, rendering a fair and impartial verdict an impossibility.

3. That the proceedings by the one-man grand juror was illegal and unlawful.

4. That your Petitioners were not permitted to be confronted by the witnesses against them.

5. That your Petitioners were not permitted to waive the prelminiary examination.

6. That your Petitioners were also forced to permit testimony against them of similar offenses by parties who were not named in the conspiracy, either as defendants or co-conspirators.

7. That your petitioners were restricted on the cross-examination of witnesses on their grand jury testimony.

IV.

ARGUMENT ON QUESTIONS INVOLVED

Question 1. Jury was illegally drawn and was empaneled in violation of the laws of the State of Michigan.

A supplemental motion for a new trial was argued before the trial Court and denied (R. 2013-18) and the Court's decision was affirmed by the Michigan Supreme Court.

For the facts regarding this question, see Supplemental Motion for a New Trial in the Petition in which same are set out.

Amendment VI of the Constitution of the United States reads as follows:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have assistance of counsel for his defense."

Amendment five of the Constitution reads in part:

> "No person shall be * * * compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law." The phrase "trial by jury" as used in the Federal Constitution means a trial by jury as understood and applied at common law, and includes all the essential elements as they were recognized in this country and in England when the Constitution was adopted.

The State of Michigan provides for a trial by a jury of twelve citizens and the Statute provides the ways and means of securing a fair and impartial jury.

The statute follows:

> "13838 Meetings, division of Detroit into districts, apportionment of jurors to be returned. Sec. 2. Said board shall meet at the office of the board provided for it by the board of auditors on the second Monday in May of each year, at ten o'clock in the forenoon, and having divided the territory within the city of Detroit into five districts, which shall be equal as near as possible, shall assign one of such districts to each of the commissioners who are residents of said city; and like assignment of the territory outside of said city shall likewise be made to the remaining commissioners. They shall also apportion among said commissioners and their respective districts the number of petit jurors to be returned for each of the courts as provided by this act. Said apportionment shall be made according to the number of inhabitants in the territory assigned to each commissioner by the last preceding general census taken by this state or the United States: Provided, that in taking an apportionment and return of petit jurors for the circuit court, not less than seven jurors shall be apportioned to and returned for any township or ward: And provided further, That in making a return of jurors for the city of Wyandotte, such jury shall be returned at large from said city, and the same as though it had not been divided into wards.
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> "13839 Duty of Commissioners; filing of lists. Sec. 3. Each of said commissioners shall make a list of names of the number of qualified persons apportioned to his district as aforesaid, to serve as petit jurors for the ensuing year, for each of the courts of record in Wayne county, for which jurors are required by law to be summoned. They shall also make a list of names of persons to serve

as jurors in the police court of the city of Detroit in the same manner as the making of such list is provided for in section twenty-two of act number two hundred and eighty-seven (287) public acts of eighteen hundred and eighty-seven by the board of jury commissioners herein specified. Said lists, as soon as they are made, and prior to the third Monday in May, shall be filed with the secretary of said board of jury commissioners.

"13840 Meeting of board; lists; completion, certification and filing. Sec. 4. The board of jury commissioners shall meet at the office of the board on the fourth Monday in May in each year at ten o'clock in the forenoon and they shall proceed to examine the lists of persons returned by each of the said commissioners as aforesaid, and if, in the judgment of said board, the persons whose names were so returned are suitable persons, having the qualifications of jurors, and not exempt from service as such, said board shall make therefrom a complete list of persons for each of the courts for which lists of jurors are required to be returned, which list shall be recorded at length, in the records of said board, and a copy thereof shall be made, certified to be a true list of jurors made by said board for the court, naming it, for which it is made for the then ensuing year, which certificate shall be subscribed by said commissioners, or a majority of them, and shall be filed in the office of the clerk for the court for which said list shall be made. If, in the judgment of said board, any of the persons whose names are contained in the list returned by said commissioners, respectively, are not suitable to serve as jurors, or if they are exempt or not qualified, such names shall be omitted from the lists required by this section to be made by said board, and in place of the names so omitted, said board shall select and include in said list made by the board, names of suitable and eligible

persons, sufficient in number to complete said list, and if any of said commissioners shall neglect to return the list of names as aforesaid for his district as aforesaid, said board shall select and return in the lists to be made by them, names of suitable and eligible persons sufficient to complete the same. Such list shall state the township and ward in which the persons returned, respectively, are resident, and if they reside in the city of Detroit, shall state the place of residence by reference to street and house number. The name of a commissioner shall be returned in said lists.

"13841 Jurors; qualifications, examination by judge, cause for challenge, persons excused. Sec. 5. The persons whose names shall be returned by said board of jury commissioners shall be suitable to serve as jurors. They shall have the qualifications of electors in the town or ward in which they reside and for which they are returned by said board; they shall be persons of good character, of approved integrity, of sound judgment and well informed, conversant with the English language, in possession of their natural faculties, not infirm or decrepit, and otherwise free from all legal exceptions. No person shall be returned or shall be qualified to be or become one of a panel of petit or grand jurors in any court of record in Wayne County who within three years prior thereto has been or acted as a member of a panel of petit or grand jurors whether summoned on the original panel or added thereto as talesmen, in a court of record, except as otherwise provided in section 21, and it shall be the duty of each of said courts on the return day of the venire to inquire of the jurors summoned if any of them have served as jurors during the preceding three years and to excuse from service any jurors who have so served. It shall also be the duty of the judges of each of said courts by special orders to be entered upon the court journal to cause examination and investigation to

be made into the qualifications of each and every juror, who shall be summoned as provided by this act, and to direct the manner in which such examination and investigation shall be made; and neither of said courts shall allow any person to be or become one of a panel of petit or grand jurors therein until it shall be made to appear to the satisfaction of such court, after such examination and investigation, that such person has all the qualifications specified in this section. It shall also be the duty of each of said courts forthwith to excuse from service as jurors any and all persons who shall not so be shown to possess all of such qualifications. The particular manner in which such examination and investigation has been made shall be set forth in the journal of said court; and it shall be a just cause of challenge to any juror in any cause, over and above all other challenges allowed by the law, that it does not so appear in and by said journal that such juror has all of said qualifications. And it shall also be the duty of each of the judges of said courts, whenever he shall have reason to doubt whether any person in attendance upon said court as a juror is possessed of all of said qualifications, forthwith to excuse such juror from further attendance and service as such juror.

"13842 Names to be returned each year. Sec. 6. There shall be returned each year by the said board to serve as jurors in the circuit court of said county the names of three hundred persons who shall be residents of said county and as petit jurors in the recorder's court of the city of Detroit the names of six hundred persons who shall be residents of said city but either of said courts may direct a different number of persons to be returned by said board by an order to be entered on its journal, a copy of which order, certified by its clerk, shall be delivered to the secretary or president of such board at least thirty days prior to said

second Monday in May, and said board shall thereupon return for said court the number of names mentioned in said order.

"13843 Duty of clerk's on receipt of list; sealing of jury box. Sec. 7. The Clerk of the court, on receiving said list shall file it in his office, shall forthwith write the names of the persons thus selected on separate strips of paper of the same size and appearance, as nearly as may be, shall fold up each of said strips of paper in the same manner so as to conceal the name thereon, and deposit and preserve the same in a box, to be called and labeled 'Jury Box,' and the persons whose names are thus returned and deposited in said jury box shall be liable to serve as jurors for one year and until another list shall be selected, returned and filed with said clerk, and the names thereon deposited in said jury box in the manner aforesaid. Immediately upon the depositing of the names so returned, in the jury box, the clerks shall seal up such lists (list) of jurors and said list shall remain sealed unless otherwise ordered by the presiding judge of the court for which such list is filed."

Your petitioners claim that the authorities of the State of Michigan did not follow the statute and as a result no fair and impartial jury was drawn. They had a right to believe and to expect that when they questioned and challenged the jurors that such jurors had been properly drawn. Such, however, was not the case, and your petitioners believe and say that the said illegal method of drawing the jurors was for some ulterior motive of defeating justice and to "railroad" your petitioners. *Glasier v. U. S.*, 315 U. S. 60, 85-87; *Kentucky v. Powers,* 201 U. S. 1; *Pierre v. Louisiana,* 306 U. S. 354.

Question 2. That the jury while deliberating was interfered with by a deputy sheriff attached to the trial court.

A person is entitled to a fair and impartial verdict by the jury and interference by a deputy sheriff without the authority of the court in an attempt to help the jury to arrive at a verdict is strictly an attempt to deprive your Petitioners of a fair and honest verdict, and follows by innuendo the schemes stated in Question 1 to make sure that your petitioners would not receive a fair and impartial verdict. The Michigan Supreme Court laid down the basic principle in *Findley v. People,* 1 Mich. 234. "Jurors may, with the consent of the parties, take papers and exhibits received in evidence into the jury room, but they have no right to take other papers." This rule laid down by the Michigan Supreme Court was followed in *People v. Dowdigan,* 67 Mich. 92, (This Court has repeatedly asserted that unauthorized communication between the officer who attended the jury and the jury are grounds sufficient to set the verdict aside. *People v. Knapp,* 42 Mich. 267; *People v. Montague,* 71 Mich. 447; *People v. Levey,* 206 Mich. 129; *People v. Chambers,* 279 Mich. 73) but was discarded in their decision in this cause, in violation of the rights of your petitioners as guaranteed by Amendments 5, 6 and 14 of the Constitution of the United States.

Question 3. That the proceedings by the one-man grand juror was illegal and unlawful.

Your petitioners contend that they were forced to go through a trial based on an illegal document, claimed to be a warrant which was issued by a one-man inquisitorial body, in the form of Judge Homer Ferguson, who forced

them to go through a preliminary examination before himself and bound them over for trial.

The Constitution of the State of Michigan has guaranteed the accused the right to a fair and impartial trial. The Legislature has likewise enacted a statute to guarantee the accused a fair and impartial examination.

Compiled Laws '29, Sec. 17193, Stat. Ann. 28919, Section 1, reads:

> "The state and the accused shall be entitled to a prompt examination and determination by the examining magistrate in all criminal causes, and it is hereby made the duty of all Courts and public officers having duties to perform in connection with such examination to bring them to final determination without delay, except as it may be necessary to secure to the accused a fair and impartial examination."

Further, *Gillespie's Michigan Criminal Law and Procedure* comments in paragraph No. 426 at p. 504 in Volume 1:

> "Prejudice or bias, in order to disqualify a judge, must be present in fact and can never be based upon his decision in due course of judicial proceedings. Unless the fact of prejudice or bias is established, or the necessities of justice to the defendant require it; a change of judge is an injustifiable wrong to the public, for it works delay, entails expense and endangers the prosecution."

The text cites in support thereof, *Kolawich v. Ferguson*, 264 Mich. 668.

Petitioners herein invoke the statute, therefore which affords delay where it is necessary "to secure to the accused a fair and impartial examination."

Further, petitioners claim that because of the peculiar nature of the Grand Jury itself as being an inquisitional body, delving and probing into the matters beforehand, that this *prima facie*, establishes of necessity that bias and prejudice as suggested hereinbefore, and in the case of *Kolawich v. Ferguson, supra,* is actually present so as to preclude Judge Homer Ferguson from conducting a fair and impartial examination.

The motion to disqualify said Judge Ferguson having been seasonably made, should have been granted.

Question 4. That your petitioners were not permitted to be confronted by the witnesses against them.

Several witnesses testified as to letters, statements and conversations with persons now deceased or missing and your petitioners had no opportunity to cross-examine these persons, and were denied such opportunity.

From the testimony of William Dowling (R. 88):

> "* * * I called for the Superintendent of Police, found that Fred Clark was acting as Superintendent of Police in the absence of Fred Frahm, who was out of town. I asked that the Chief of Detectives come to my office. I told him that this man, William McBride, whose name had been mentioned in these letters as being the payoff man by and between certain gamblers and the Police Department should be apprehended and held incommunicado until I had talked to him first.
>
> Mr. Schemanske: Just a minute, your Honor, please, I think I want to renew my objection again, for the reason that certainly it is very prejudicial and certainly would have no bearing upon the defendants in this particular cause. There are no police officials of the City of Detroit charged here,

and this charge here is conspiracy to obstruct justice'' (89).

Despite numerous objections the Court permitted Dowling to continue:

> "The Police Department under the direction of Fred Clark, did not continue to investigate the matter. As a matter of fact on the contrary, Fred Clark, absolved the officers and terminated the investigation, as far as I know. He exonerated the officers (105).
>
> Mr. Fitzgerald: May the Court please, I object to this line of testimony. It has no probative value here. * * * I ask that all that be stricken (105).
>
> The Court: The motion is overruled'' (106).

The record in this cause clearly shows that the testimony of Fred Clark is irrelevant and incompetent and critically prejudicial. The trial court's erroneous ruling in allowing this testimony to be adduced, was a direct violation of the defendant's constitutional right to a fair and impartial trial. It served no purpose other than to becloud the issue and to befog the minds of the jury, by inference that your petitioners were connected with charges against the Metropolitan Police Department.

Has not the Michigan Supreme Court held in substance in *People v. Knap,* 26 Mich. 112:

> "'* * * There can be no criminal responsibility against one who was himself engaged in the acts of his associates, unless it is within the scope of a combination to which he was a party and thus authorized by this joint act. * * *.''

Fred Clark not being a party indicated in the instant case was in no way a party to any combination which touched and concerned the instant case. We submit the Court should have excluded the testimony.

Over objections of defense attorneys, Witness Dowling was allowed to go on unbridled, in his narrative concerning these letters and other prejudicial subjects, which could not be cured by later instruction.

The Michigan Supreme Court has referred to this type of testimony and its effect on the jury; in an instance where prejudicial remarks of counsel was the medium of bias and prejudice.

The case of *People v. Kolawich,* 262 Mich. 137, is analogous to the instant case in so far as the effect of prejudice on the minds of the jurors. Said the Court:

> "* * * It is true that the trial judge expressly instructed the jury to disregard the remarks but the damage is done. An ink spot may be blotted out in part, but the stain still remains."

The Michigan Supreme Court has held likewise in *People v. Bigge,* 288 Mich. 417 (p. 421) that:

The responsibility of maintaining the right of fair trial and due process of law, is placed within the judicial branch and cannot be otherwise by legislative permission."

See also: *People v. Nixon,* 243 Mich. 630.

We submit further, that the error complained of has resulted in a miscarriage of justice within the purview of Michigan Compiled Laws 1929, Section 17354.

And then again when witness Sam Block testifies:

> "Following that conversation with Colburn, I contacted several people in Hamtramck, Wayne County. I contacted Elik Gell. As far as I know, he is dead. I believe he died within the last few months. I didn't know exactly what his business

was at the time. I knew later on he was a handbook operator. I knew that he knew most of the people out there, that were in the different illegal businesses. On that occasion or at that time, I had a conversation with Elik Gell with reference to the illegal enterprises in Hamtramck.

Q. Tell us what this conversation was with Gell?

Mr. Maiullo: Just a minute I object to that. Unless there was somebody else present, certainly it is equally within the knowledge of the deceased and how can we disprove it (248).

Mr. O'Hara: That rule does not apply in criminal cases, in the first place. And in the second place, Elik Gell is charged as a co-conspirator, was not apprehended and he is now dead. We can't help it because he died. So I say that they being co-conspirators, he being charged, rather as a co-defendant—not as a co-conspirator, he was charged as a co-defendant, that whatever transpired between this witness and Elik Gell is competent proof (249).

Mr. Maiullo: The only theory that you can introduce that is on the ground of agency, isn't it? If this man acted as agent of Elik Gell, he might testify. But if Elik Gell is dead, how can we tell (249)?

Mr. O'Hara: We are asking Mr. Maiullo, on the ground that he is a co-defendant in a conspiracy (249).

Mr. Fitzgerald: I would like to have the benefit of that objection for the clients I represent and also Mr. Schemanske's (249).

Mr. Willard: I make the further objection that Elik Gell is now dead and he couldn't be a co-defendant. That is on behalf of Bertha Malone (249).

Mr. O'Hara: Of course, your Honor, I might say, so that the Court will understand the situation clearly, that at the time this warrant was issued and he was charged as a co-defendant, he was not dead (249).

The Court: I understood that.

Mr. Darin: There is no proof of his death, as to the time. We merely have Mr. O'Hara's statement not under oath that he is dead (249).

Mr. O'Hara: It doesn't make any difference whether he is dead or not, he is a co-defendant, not apprehended" (249).

After considerable argument—

"The Court: I am ruling he may answer the question" (251).

After which Sam Block continued in his testimony concerning Mr. Gell and how Gell collected from illegal establishments in Hamtramck, which testimony was very prejudicial to the defendants (251 to 253).

Under what theory Sam Block's testimony concerning Elik Gell's activities is admissible is an enigma to these petitioners. It is axiomatic that death abates a prosecution against the accused. Therefore if witness Block's testimony were elicited from him on the theory that Elik Gell was a co-defendant and therefore binding as to him, and if as stated by prosecution Gell was dead, the case as to him is abated and evidence against him is surplusage as to him; excepting, however, that this testimony concerning Gell as adduced from Sam Block was deeply prejudicial as to the other defendants and your petitioners.

Sec. 17319 Michigan C. L. 1929; Sec. 281049 Stat. Ann. reads:

"Testimony taken at an examination, preliminary hearings, or at a former trial of the case, or taken by deposition at the instance of the defendant, may be used by the prosecution whenever the

> witness giving such testimony cannot, for any reason, be produced at the trial, or whenever the witness has, since giving such testimony become insane or otherwise mentally incapacitated to testify."

Michigan Criminal Laws and Procedure by Gillespie, notes (Sec. 417 at page 482) concerning this statute:

> "Prior to the enactment of the statute it had been held proper to admit the testimony of a witness given at a former trial or preliminary examination when the witness was dead; outside the jurisdiction of the Court; too ill to attend the trial or the prosecution was unable after diligent search to procure his attendance, but not, where it did not appear what efforts had been made to secure his presence. The rule, however, does not admit testimony given at a coroner's inquest, an extradition hearing, or a trial of a co-defendant."

The Supreme Court in commenting on this type of evidence as referred to in the foregoing statute, held in *People v. Dowdigan,* 67 Mich. 95, in substance:

> "* * * This recognized exception to the general rule, does not abridge the defendant's constitutional right to be confronted with the witnesses against him, because he was present in Court when the former testimony was given, and had a full opportunity to avail himself of all rights of cross-examination * * *."

We submit, therefore, that the statute just quoted limited the admission of former testimony under oath to certain circumstances, that this statute was quoted to show the safeguards that have been thrown about, the acceptance of testimony of absent witnesses, to emphasize the fact that nowhere in the statutes or in the law prece-

dent is their authority to admit in evidence, testimony such as was Sam Block's, relative to the deceased co-defendant, Elik Gell.

On the contrary the statute hereinbefore quoted is predicated on the theory as insisted upon by the Supreme Court in *Walterhouse v. Walterhouse,* 130 Mich. 89.

People v. Case, 105 Mich. 92;
People v. Meyers, 239 Mich. 105.

That there must have been opportunity for cross-examination.

Your petitioners state that their rights to a fair and impartial trial were violated and abused in defiance of their rights guaranteed by the Constitution of the United States.

Question 5. That your petitioners were not permitted to waive to the preliminary examination.

Paragraph 2 of the Motion to Quash, herein referred to (59) avers as follows:

> "That the examination was illegal in that this defendant attempted to waive examination and in spite of his waiver, the examining magistrate forced this defendant into the examination of this cause in violation of his constitutional rights."

Again objection by Mr. McCrea in which he objected to the use of the record of the examination, because (612):

> "* * * I claim at the examination the constitutional rights of the defendants, including this defendant, were breached and violated because they were not given proper opportunity to cross-examine the witnesses at that time."

Again by Mr. Schemanske:

> "And I further object, if your Honor please, for the following reasons: First, that the examination was not conducted for all the defendants in this case, the charges being conspiracy. Some of the defendants were not present at the examination" (612).

The statute relative to the holding of a preliminary examination and which gives the accused the right to waive such examination reads:

> "No information shall be filed against any person for any offense until such person shall have had a preliminary examination therefore, as provided by law, before a Justice of the Peace or other examining magistrate or officer, unless such person shall waive his right to such examination." * * *
>
> Sec. 17256 C. L. 1929; Sec. 28982 Stat. Ann.

The foregoing establishes, therefore, that a defendant may not be forced legally to undergo a preliminary examination; that he has therefore, the legal right to waive said examination.

Now deductions from either premise—first, that where a court forces a defendant to undergo preliminary examination despite said defendants' waiver thereof; or where a court proceeds with a preliminary examination where all the defendants are not present, and hence taking testimony in their absence, leaves the court proverbially between the horns of the dilemma. In the first instance the Court has violated the defendant's statutory right of waiving the examination as hereinbefore quoted; in the second by taking testimony in the defendant's absence, the Court militated against the defendant's right to be

confronted with the witness against him as guaranteed by the Michigan Constitution 1908, Article 2, Section 19. And as further having been classified by the Michigan Supreme Court, which held:

> "Nothing in the nature of testimony may be taken in the absence of the accused."
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> *People v. Raider,* 256 Mich. 131.

Question 6. Your petitioners were also forced to permit testimony against them of similar offenses by parties who were not named in the conspiracy either as defendants or co-conspirators.

Neither Everett Watson or Elmer Ryan were named as co-conspirators or as defendants (see Record p. 305) but the record discloses that witness Block was asked how much Mr. Ryan gave him in 1937.

Mr. Schemanske thereupon objected. Prior to this, Sam Block was asked (274-275) concerning payments by Everett Watson. Whereupon counsel for defendants objected. Mr. O'Hara sought to justify the questions concerning Mr. Ryan and Mr. Watson as being within purview of Sec. 17320 (275). The Court allowed Block to continue in his testimony concerning Ryan and Watson on the theory as bearing upon the question of intent or the general plan or scheme of things (307).

Now there is nothing in the record connecting Elmer Ryan and Everett Watson with the instant case, except the claim by the prosecutor that he would show intent, etc., per Sec. 17320 C. L. 1929.

Intent or guilty knowledge is a necessary conclusion from the charges in the information. Acts done in accord-

ance thereto are not susceptible of any theory of accident, the crime charged often leaves no inference other than that it was done with guilty knowledge and intent.

The Michigan Supreme Court said:

> "The prosecuting attorney in his opening statement charged defendant was guilty of forgery. On the trial he offered proof of it. The forgery, if any existed, which is, under the testimony doubtful, related to a separate and distinct transaction. The proof offered was proof to establish a separate and distinct offense. The prosecuting attorney was in error in making reference to the jury, thereto in his opening statement. The trial Court was in error in receiving proof of such forgery."
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> *People v. Lewis,* 264 Mich. 83.

See also:

> "Where the intent or guilty knowledge is a necessary conclusion from the act done, proof of other offenses of a similar nature or character is inadmissible and violates the rule that the evidence must be confined to the issue. Upon the record, there is no room for an inference that death resulted from accident or that the operation was performed to save the life or health of the deceased. On the contrary, if the jury found that the dying declaration of the deceased was true, the crime was complete, and the jury could not find otherwise than that it was done with guilty knowledge and intent. This testimony should have been excluded and for this reason the conviction must be set aside."
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> *People v. Lansdale,* 122 Mich. 388 (p. 392).

See also: *People v. Trudell,* 220 Mich. 166;
People v. Kirilidis, 285 Mich. 694;
People v. Wright, 294 Mich. 20;
People v. Dean, 253 Mich. 434.

The testimony relative to Ryan and Watson was hence exceedingly prejudicial to the accused.

Question 7. That your petitioners were restricted in their cross-examination of witnesses on their grand jury testimony. The trial court adopted the policy and theory of the prosecution that: "He has no right to ask any questions about what happened in the grand jury unless I bring it out, and that is the law" (R. 361-364).

The opinion of the Supreme Court of the State of Michigan states that with respect to the denial of petitioner's efforts to lay a foundation for impeachment of witnesses by bringing out what their testimony before the grand jury had been, that the petitioner

> "could have examined or cross-examined witnesses without referring to their grand jury testimony. If he was not satisfied with their testimony, he could have called either Judge Ferguson or the stenographer who took the grand jury testimony to testify as to whether the witnesses' testimony before the grand jury was 'different from' the evidence given by such witnesses at the trial" (R. 2096).

That this is no answer is made only too clear by the ruling of the Trial Court holding that petitioner "could not go into the grand jury here" (R. 242) and that the petitioner had "no right to ask any question about what happened in the grand jury" unless first developed by the government (R. 361-364, 479). In each instance the Trial Court sustained the prosecutor's objections "to any question with reference to the grand jury testimony" (R. 362). Thus there was real merit to petitioner's contention that it would have been futile to call Judge Fergu-

son (the one-man grand juror, notwithstanding what the Court below says (R. 2097)). Assuming that Judge Ferguson could have been called, the right to cross examine should not have been so delimited.

We are at a loss to understand a theory that permits the prosecution to lay a foundation for impeachment but denies the same opportunity to the defendant. We know of no policy, State or Federal, sanctioning one rule of evidence in favor of the State and following the opposite of the rule against the defendant. No traditional rule of secrecy of grand jury proceedings is in any way involved. The viciousness of so restricting the petitioner goes to the right of cross examination which this Court has held to be a fundamental right and of the essence of due process of law.

In *Alford v. United States,* 282 U. S. 687, it is stated that

> "The cross examination of a witness is a matter of right." *The Ottawa,* 3 Wall. 268, 271.
>
> "Its permissible purposes, among others, are * * * that facts may be brought out tending to discredit witness by showing that his testimony in chief was untrue or biased. *Tla-Koo-Yel-Lee v. United States,* 167 U. S. 274; *King v. United States,* 112 Fed. (2d) 988; *Farkas v. United States,* 2 Fed. (2d) 644; see *Furlong v. United States,* 10 Fed. (2d) 492; 282 U. S. 692,"

The vital importance of permitting such cross-examination lies in the realization that counsel

> "cannot know in advance what pertinent facts may be elicited on cross examination. For that reason it is necessarily exploratory; * * * it is the essence of a fair trial that reasonable latitude be given the

> cross-examiner, even though he is unable to state to the court what facts a reasonable cross-examination might develop * * *. To say that prejudice can be established only by showing that the cross-examination, if pursued, would necessarily have brought out facts tending to discredit the testimony in chief, is to deny a substantial right and withdraw one of the safeguards essential to a fair trial. *Nailor v. Williams,* 8 Wall. 107, 109."

In the present case, some of the witnesses to whom questions were propounded with respect to their grand jury testimony were co-defendants who had turned state's evidence. The essential need for permitting the defense to test their credibility, in the light of what they might have previously testified to before the grand jury prior to immunity granted, is epitomized in the language of Chief Justice Stone in *Alford v. United States,* 282 U. S. 687, wherein he states that the defendant should be permitted to show by such facts as proper cross-examination might develop that the testimony of the witness was biased because "given under promise or expectation of immunity or under the coercive effect of his detention by officers of the United States, which was conducting the present prosecution."

Clearly the Trial Court cut off *in limine* all inquiry on a subject with respect to which the defense was entitled to a reasonable cross-examination (282 U. S. 694). *Cf. Gaines v. United States,* 277 U. S. 81, 85; *Dowell v. United States,* 221 U. S. 325.

In the setting of the trial below a substantial right was denied. Wigmore has said "if we omit political considerations of broader range, then cross-examination, not trial by jury, is the great and permanent contribution of the Anglo-American system of law to improve methods of

trial-procedure." *Wigmore on Evidence,* (3 ed.) Sec. 1367, page 29.

The ruling of the Court below is contrary to every known authority: *Regina v. Gibson,* 1 Car. & M. (41 Eng. Com. L. 364); *State v. Silverman,* 100 N. J. L. 249, 252, 253; *Commonwealth v. Mead,* 12 Gray (Mass.) 167; *Burdick v. Hunt,* 43 Ind. 381-9.

This Court has stated that while due process is essentially a matter of state law, that nonetheless there must be an adequate opportunity to be heard and to defend. What could be more important to the defense of petitioners in a conspiracy case than the opportunity to lay a foundation for the impeachment of his alleged co-conspirators, some of whom had turned state's evidence, and left him in the position of pitting his word against theirs?

Petitioners ask for a writ of certiorari from this Court to the Supreme Court of the United States of America to review its affirmance of the sentences imposed by the Circuit Court for the County of Wayne, Michigan, and said Supreme Court's denial of an application for a rehearing.

Respectfully submitted,

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EXHIBIT 1

MICHIGAN SUPREME OPINION

People v. Thomas C. Wilcox

STATE OF MICHIGAN—SUPREME COURT

The People of the State of Michigan,
Plaintiff and Appellee,
v.
Thomas C. Wilcox, et al.,
Defendants and Appellants.

BEFORE THE ENTIRE BENCH, except Wiest, J., and Boyles, J., Butzel, J.

Thomas C. Wilcox, one of the defendants in the case of People v. Wilcox, McCrea, et al., filed a separate appeal. It is presented together with the separate appeals of other co-defendants, and comes to us on the same record that was presented in the appeals of Mr. McCrea and the other separate appellants. In the opinions filed this day in the appeals of defendant McCrea and other co-defendants, we discussed and decided almost all of what we regard as the important questions raised by appellant on his appeal. We, therefore, find it unnecessary to repeat what was said in the opinions deciding the appeals of McCrea and others, but include what was said therein by reference and without repetition. There are but few other questions raised by appellant Wilcox that in our opinion require discussion.

The general outline of the charges against appellant Wilcox and others is set forth in the statement of fact in the McCrea opinion. As the question of the weight of the evidence only was raised by appellants McCrea, Garska and

Scaduto and not by appellant Wilcox or any of the other co-defendants, it becomes necessary to go into more detail in this opinion in regard to the testimony offered by the prosecution.

Appellant claims, that, as the Honorable Homer Ferguson, Circuit Judge, was designated to make an investigation into certain conditions claimed to have existed in Wayne County, thus he was limited in scope in inquiring into gambling conditions; that he could not investigate other vice conditions. Unfortunately, the petition and order for the investigation have not been included in the record. The petition for the investigation of suspected offenses was made in accordance with 2 Comp. Laws 1929, Sec. 17217 (Stat. Ann. Sec. 28.943). The special prosecutor, however, calls our attention to the fact that the petition has been before us in other cases and that we considered it in In re Watson, 293 Mich. 263. The petition, as shown in the *Watson case* was "for the purpose of investigating the existence of gambling and the possible protection thereof by any officials in Wayne County, and matters relating thereto, including any failure to enforce the criminal law prohibiting gambling and the operation of gambling institutions and possible connection between such enterprises and law enforcement officials." Through an abundance of caution, we have sent for the original petition and find that it stresses the corruption of law-enforcing officials in connection with such gambling. It further states that there was probable cause to suspect that certain crimes, causes and misdemeanors had been committed within the county of Wayne, State of Michigan, and particularly that such gambling has been permitted with the knowledge and consent of law-enforcing officials.

Appellant claims that a one man grand jury having been appointed for the special purpose of investigating gambling

could not go on a "fishing expedition" to investigate crime in general. Section 17217, 3 Comp. Laws 1929 (Stat. Ann. Sec. 28.943) reads as follows:

> "Whenever by reason of the filing of any complaint, which may be upon information and belief, any justice of the peace, police judge or judge of a court of record shall have probable cause to suspect that any crime, offense, misdemeanor or violation of any city ordinance shall have been committed within his jurisdiction, and that any person may be able to give any material evidence respecting such offense, such justice or judge in his discreation may, and upon the application of the prosecuting attorney, or city attorney in the case of suspected violation of ordinances, shall require such person to attend before him as a witness and answer such questions as such justice or judge may require concerning any violation of law about which he may be questioned; and the proceedings to summon such witness and to compel him to testify shall, as far as possible, be the same as proceedings to summon witnesses and compel their attendance and testimony, and such witnesses shall be entitled to the same compensation as in other criminal proceedings."

The prosecution claims that the statute does not restrict the scope of the investigation when once begun. The question before us in the instant case is further limited to the query whether in an investigation involving corruption and connivance of public officials in permitting commercialized gambling, if the testimony develops that the same persons who exacted payments from gambling houses also collected from the operators of houses of prostitution and other illegal enterprises and paid all of such sums to the same officials, an indictment should not include the entire conspiracy and all the conspirators.

In the case of Hale v. Henkel, 201 U. S. 43, Mr. Justice Brown quoted with approval from a lecture given by Mr. Justice Wilson of the United States Supreme Court as follows:

> "It has been alleged that grand juries are confined in their inquiries to the bills offered to them, to the crimes given them in charge, and to the evidence brought before them by the prosecutor. But these conceptions are much too contracted; they present but a very imperfect and unsatisfactory view of the duty required from grand jurors, and of the trust reposed in them. They are not appointed for the prosecutor or for the court; they are appointed for the government and for the people; and of both the government and people it is surely the concernment that, on one hand, all crimes, whether given or not given in charge, whether described or not described with professional skill, should receive the punishment which the law denounces."

The testimony shows that the conspiracy was for the purpose of collecting money from all types of illegal business, including vice. The examining magistrate did not exceed his authority.

Appellant Wilcox claims it was error to introduce testimony in regard to the suicide of Mrs. Janet McDonald and the murder of her child, and the letters she left claiming corruption of public officers. It was shown that defendant McCrea not only refused to do anything in regard to the charges but even attempted to stop an investigation. This became very material as far as defendant McCrea was concerned and the testimony was admitted as to defendant McCrea. The court distinctly stated that the testimony in regard to Mr. McCrea's conversation with Mr. Dowling

could not be binding on anyone except defendant McCrea until the conspiracy was established. The court repeated this statement. The testimony was material as far as McCrea was concerned and properly received in evidence. It is true that frequently testimony, introduced in a conspiracy case, may not be binding upon all of the conspirators, but nevertheless it may be material in the proofs against some defendants and if the conspiracy is once established, such testimony may affect all conspirators but it is one of the penalties that they suffer.

Specific objection is now made for the first time to the testimony in regard to Mrs. McDonald's letters. As such objection was not made at the trial, we need not discuss it.

The testimony showed that one Elik Gell took a very prominent part in the conspiracy. At the request of Block, the collector for defendants McCrea and Colburn, Gell made collections from various illegal business in the city of Hamtramck. To prevent interference with various forms of vice in the Hamtramck district, where it flourished, Gell paid Block $2,800 a month for the prosecutor's office. He also collected for the sheriff's office. Block also testified that he personally paid to Gell monthly sums for the sheriff's office so that Block could operate a handbook in Hamtramck. Block, testifying to his dealings with Gell, was asked: "Tell me about this conversation with Gell?" immediately the attorney for one of the defendants objected. He stated that unless there was someone else present it was within the knowledge of the deceased and "how can we disprove it." Later on he further stated that "the only theory on which you can introduce this is on the ground of agency. If the witness was the agent of Elik Gell, he could testify. If Elik Gell is dead, how can he testify?" The special prosecutor stated that the rule defendant's counsel invoked only applied to civil cases; fur-

ther, that Gell was a co-conspirator and a co-defendant who had died prior to the trial. The objection was not properly made. In appellant's brief, however, the argument is made that the accused always has the right to be confronted with the witnesses against him and that there would be no way of disproving a conversation had with the deceased person in his lifetime.

The relations with Elik Gell were part of the res gestae and everything that Gell did was in furtherance of the conspiracy. Our attention has been called to only one case of very high authority where the precise question has arisen. A similar objection was made as to the admissibility of testimony showing what the co-conspirator, who died prior to the trial, had said in his lifetime in furtherance of the conspiracy. In Delaney v. United States, 263 U. S. 586, the court said:

> "The only exception, however, was of testimony given by one of the conspirators of what another one of the conspirators (the latter being dead) had told him during the progress of the conspiracy. We think the testimony was competent and within the ruling of the cases. American Fur Co. v. United States, 2 Pet. 358, 7 L. ed. 450; Nudd v. Burrows, 91 U. S. 426, 438, 23 L. ed. 286, 289; Wiborg v. United States, 163 U. S. 632, 41 L. ed. 289, 16 Sup. Ct. Rep. 1127, 1197. And it has been said that the extent to which evidence of that kind is admissible is much in the discretion of the trial judge. Wiborg v. United States, 163 U. S. 632, 658, 41 L. ed. 289, 298, 16 Sup. Ct. Rep. 1127, 1197. We do not think that the discretion was abused in the present case.
>
> "There is nothing in the record which justifies a reversal of the case, and the judgment of the circuit court of appeals is affirmed."

Appellant claims that the court erred in admitting certain exhibits produced by witness Pines, a collector for the sheriff's office, in order to show the record of alleged payments by certain defendants to Pines for the sheriff's office. Pines testified in regard to the exhibits which consisted of white and yellow slips, that the white slips were statements made under his supervision and direction for moneys collected from illegal enterprises, and that the yellow slips were his original statements made by himself; that copies of the yellow slips were furnished to defendant Staebler of the sheriff's office. The witness testified that he had kept records of receipts, that defendant Staebler of the sheriff's office wanted such records kept, that he furnished three copies of them, one for appellant Wilcox, one for Staebler and one for McGrath, the under-sheriff, who turned State's evidence. Pines stated that the yellow slips were his original records. No objection apparently was made to the introduction of these exhibits. Even if the claim of error had any merit whatsoever, no objection having been made, it need not be discussed any further.

Appellant Wilcox further claims that although he waived examination before the examining magistrate, the latter nevertheless forced him to an examination in violation of his constitutional rights; that the examining magistrate may not conduct such examination after waiver thereof by the accused. We do not need to discuss whether there would have been any merit to such objection under the former law (Sec. 15666, 3 Comp. Laws 1915). The new criminal code, 3. Comp. Laws 1929, Sec. 17193 (Stat. Ann. Sec. 28.919) distinctly provided that the State and accused shall be entitled to prompt examination and determination by the examining magistrate in all criminal cases, etc. The State may be very much interested in determining whether or not there is sufficient probable cause to hold a respondent for trial,

or it may desire to perpetuate the testimony in the event that a witness shall disappear or die before the trial. The rule is well expressed in Van Buren v. United States, 76 Fed. 77, 82, from which we quote the following excerpt:

> "The arrested party, sometimes when not guilty, in order to divert suspicion from others, but more frequently when guilty, and in order to aid the escape of confederates in the crime, is quite willing by waiving examination to suppress present inquiry; and oftener still, perhaps, this is done by the accused in the hope of suppressing the evidence against himself, or of gaining some like advantage from delay. An immediate development of the evidence and testimony is sometimes essential to the ends of justice, and it would be strange indeed if the laws are so framed, or the courts disposed so to interpret them as to deny the government this important power. Its exercise, unless wantonly abused, as almost any power may be abused, can harm no one."

Also see State, ex rel Attorney-General v. Judge, 104 La. 237; State v. Pigg, 80 Kan. 481 (103 Pac. 121); State v. Hoben, 36 Utah 186; Lyon v. State, Okla. (28 Pac. (2d) 598).

It would be somewhat ununsual if on a trial lasting over three months and in which a record of over two thousand pages is presented to us some slight errors might not have crept in. We have examined the other claims of error made by appellant and, even if there is any merit to them, they could not have affected the result or resulted in a miscarriage of justice. 3 Comp. Laws 1929, Sec. 17354 (Stat. Ann. Sec. 28.1096). It is, therefore, unnecessary to discuss them.

Judgment affirmed.

EXHIBIT 2

SUPREME COURT OPINION

on People vs. Eddie Way

STATE OF MICHIGAN—SUPREME COURT

The People of the State of Michigan,
Plaintiff and Appellee,
v.
Duncan C. McCrea, Thomas C. Wilcox, Carl Staebler, Angelo Scaduto, Eddie Way, Ben Landsberg, Louis Elliott, Clyde Stambaugh and Bertha Malone,
Defendants and Appellants.

BEFORE THE ENTIRE BENCH, except Wiest and Boyles, JJ., Starr, J.

Eddie Way, Thomas C. Wilcox, Duncan C. McCrea, and other defendants (except Angelo Scaduto), upon jury trial, were convicted of a conspiracy to obstruct justice. Scaduto waived jury trial and was found guilty by the court.

Defendant Way was sentenced for a period of two to five years and fined $1,000. His motion and supplemental motion for a new trial were denied, and, having obtained leave, he appeals. His case comes to us on the same record presented in the separate appeals of Wilcox, McCrea, and other defendants. In this opinion we consider only the appeal of defendant Way.

Our opinions in the appeals of Wilcox, McCrea, and other defendants have determined all questions presented on this appeal adversely to defendant Way, except his claim of error by the trial court in the admission of certain testimony of witness Sam Block.

The record shows that Way was engaged in the so-called handbook business and also that he was employed to collect graft protection money from houses of prostitution, gambling places, and other illegal businesses. One Gustave Pines, who acted as collector of protection money for the benefit of defendant Wilcox (sheriff) and others, testified, in part:

> "A few days after Wilcox took office as sheriff of Wayne county I had a meeting with Carl Staebler (of the sheriff's office) and Eddie Way * * *
>
> "There was a discussion with Staebler and Way of the places to be contacted. Mr. Way was going to make the collections from the houses of prostitution and gambling houses and bring the money into the office. * * * All he gave me was a list of each place and each place was paying so much. * * *
>
> "Following this conversation between me, Staebler and Way, I received money from Eddie Way for these places. * * * Eddie Way brought in these collections from these places every month. * * *
>
> "I collected from Eddie Way * * * Rouge combination $15,162.50 from February, 1937, to February, 1938. The Rouge (River) combination paid so much money because—I don't know what they had, but Eddie Way used to come in and pay for the crap game and used to come in and pay for his slot machines and the pinballs. * * * So that there was $16,362.50 actually paid in."

On this appeal defendant Way claims error in the admission of the following testimony of witness Sam Block, who was collecting graft protection money for the benefit of defendant McCrea (prosecuting attorney) and his chief investigator, defendant Harry Colburn. Block testified, in part:

"I do not know Eddie Way very well. I know him when I see him. I had one or two business dealings with him during this period of time we are discussing. I had a discussion with Eddie Way about his business. I don't remember when. I told him I understood he operated a handbook and that he would have to take care of me. He didn't like it very well, but he took care of me. I believe I told him how much it was going to cost. Off hand, I don't remember how much. It didn't last very long. Eddie Way paid me money for the privilege of running a handbook in Ecorse probably three or four months. I do not recall what year that was in. It was some time between the time that I started collecting and the time I stopped collecting. It was usually sent out to my place. He never paid me in person."

Way's counsel moved that Block's above-quoted testimony be stricken "as being purely hearsay." Such motion was denied and the testimony allowed to stand. In his brief and statement of questions involved Way does not raise the question as to Block's testimony being inadmissible as hearsay. He now contends, as stated in his brief:

"That the court should have instructed the jury to disregard such testimony (by Block) concerning Eddie Way, in view of the fact that such testimony was patently contradictory and without merit."

Such claim that Block's testimony was "contradictory and without merit" goes to the credibility of the witness and the weight to be given his testimony. The trial court satisfactorily disposed of such contention by instructing the jury, in part, as follows:

"You are the sole judges of the credibility of witnesses. It is for you, and you alone, to say what

> weight and credence shall be given to the testimony of any witness who has testified in this case. In measuring and weighing the testimony of any witness you have a right to take into consideration his or her appearance on the stand; * * * his or her knowledge or want of knowledge of the matter concerning which he or she has testified."

The testimony of Gustave Pines and of other witnesses conclusively established defendant Way's connection with the alleged conspiracy to obstruct justice.

We are convinced that in this conspiracy case the admission of the testimony of witness Block did not constitute reversible error. There was no miscarriage of justice. 3 Comp. Laws 1929, Sec. 15518 (Stat. Ann. Sec. 27.2618).

The conviction and judgment are affirmed.

EXHIBIT 3

SUPREME COURT OPINION

on People v. Clyde Stambaugh, Lewis Elliott and Ben Landsberg

STATE OF MICHIGAN—SUPREME COURT

The People of the State of Michigan,
Plaintiff and Appellee,
v.
Clyde Stambaugh, Lewis Elliott and Ben Landsberg,
Defendants and Appellants.

BEFORE THE ENTIRE BENCH, except Wiest, J., and Boyles, J., North, J.

These three defendants were tried by jury together with other defendants, including Thomas C. Wilcox, Duncan C. McCrea, and Angelo Scaduto, and convicted of being parties to a conspiracy to obstruct justice. Stambaugh, Elliott and Landsberg were convicted and sentenced. Leave having been granted, they have appealed.

All of the numerous deefndants who have appealed are before this court on one record, and these three defendants have submitted their appeals by the same counsel and on the same briefs as were filed in behalf of Wilcox and several other defendants. Extended opinions in the separate appeals of McCrea, Wilcox, and Scaduto have been filed. No question materially affecting decision has been raised by either Stambaugh, Elliott or Landsberg which has not been considered and disposed of adversely to appellants in the above noted opinions. And further the factual aspect of the prosecution insofar as essential to the present

appeals of these three defendants appear in the opinions already filed, except it may be here noted that Stambaugh, Elliott and Landsberg operated places where gambling was permitted and for a certain period Elliott collected protection money for both Prosecuting Attorney McCrea and Sheriff Wilcox.

The most serious ground of complaint urged by these appellants is that in view of the use the special prosecutor was permitted by the trial court to make of testimony given by certain witnesses in the grand jury proceeding which led to the trial of these deefndants, it was error to deny to defendants' counsel access to and use of the transcript of the remaining portions of the testimony of such witnesses given in the grand jury proceeding. Appellants' counsel assert such access was essential to enable them to complete a full and fair examination of the witnesses who were examined by the special prosecutor with reference to their grand jury testimony.

I think the request of appellants' counsel might well have been granted, but in the instant case the trial court's ruling should not be held to constitute reversible error for the reason, as noted in the opinion of Mr. Justice Starr in McCrea's appeal, another method to accomplish the desired result was available to appellants' counsel; but more particularly the convictions should be affirmed for the reason that in the instant prosecution the testimony is so overwhelmingly conclusive of the guilt of the respective appellants that reversal on the ground under consideration would be a travesty upon justice; and further except we were to indulge in mere speculation we could not say from the record before us that the ruling of the trial judge was prejudicial to appellants.

Conviction and judgment of each of these appellants are affirmed.

EXHIBIT 4

STAY OF PROCEEDINGS

The People of the State of Michigan, Plaintiff, v. Thomas C. Wilcox, Bertha Malone, Carl Staebler, Clyde Stambaugh, Lewis Elliott, Ben Landsberg, and Eddie Way, Defendants.	41723, 41724, 41725, 41726, 41727, 41728, 41729

At a session of the Supreme Court of the state of Michigan, held at the Supreme Court Room, in the Capitol, in the city of Lansing, on the fourth day of January, in the year of our Lord one thousand nine hundred and forty-three.

Present: The Honorable Emerson R. Boyles, chief justice; Bert D. Chandler, Walter H. North, Raymond W. Starr, Howard Wiest, Henry M. Butzel, George E. Bushnell, Edward M. Sharpe, associate justices.

In this cause defendants having filed a petition for stay of execution and release on bail pending their application to the Supreme Court of the United States to review the judgment of this Court affirming the judgment and sentence of the Circuit Court for the County of Wayne, and due consideration thereof having been had by the Court, it is ordered that the prayer of said petition be granted, and that the judgment and decision of this Court be and the same is hereby stayed for a period of thirty days, and in the meantime defendants be and they are hereby continued at liberty on the bail heretofore filed in this cause upon con-

dition however that defendants shall within the period of time herein mentioned duly prepare and file their application to the Supreme Court of the United States for the issuance of a writ of certiorari to review the aforesaid judgment and decision of this Court.

State of Michigan—ss.

I, Jay Mertz, clerk of the Supreme Court of the state of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this 5th day of January, in the year of our Lord one thousand nine hundred and forty-three.

Jay Mertz,
Clerk.

(Seal)

EXHIBIT 5

FURTHER STAY OF PROCEEDINGS

The People of the State of Michigan, Plaintiff, v. Thomas C. Wilcox, Bertha Malone, Carl Staebler, Clyde Stambaugh, Lewis Elliott, Ben Landsberg, and Eddie Way, Defendants.	41723, 41724, 41725, 41726, 41727, 41728, 41729

At a session of the Supreme Court of the state of Michigan, held at the Supreme Court Room, in the Capitol, in the city of Lansing, on the twenty-ninth day of January, in the year of our Lord one thousand nine hundred and forty-three.

Present: The Honorable Emerson R. Boyles, chief justice; Bert D. Chandler, Walter H. North, Raymond W. Starr, Howard Wiest, Henry M. Butzel, George E. Bushnell, Edward M. Sharpe, associate justices.

In this cause a motion is filed by defendants for an order continuing the order heretofore issued herein on January 4, 1943, staying execution, in effect, and nothing in opposition thereto having been filed by plaintiff, and due consideration thereof having been had by the Court, it is ordered that the order heretofore entered herein on January 4, 1943, staying execution, be and the same is hereby continued in full force and effect for a period of fifteen days from and after February 3, 1943.

State of Michigan—ss.

I, Jay Mertz, clerk of the Supreme Court of the state of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

In testimony whereof, I here hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this 29th day of January, in the year of our Lord one thousand nine hundred and forty-three.

Jay Mertz,
Clerk.

(Seal)